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No. 515

# In the Supreme Court of the United States

OCTOBER TERM, 1957

FRANK M. SHERRILL, as Trustee of CUYAHOGA
COUNTY, OHIO, Petitioner,

v.

THE UNITED STATES [illegible]

ON PETITION FOR [illegible]

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# In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 518

FRANK M. BRENNAN, AS TREASURER OF CUYAHOGA COUNTY, OHIO, PETITIONER

*v.*

THE UNITED STATES, FLORENCE F. FERTIG, JULIA C. DEFRANCO, ETC., ET. AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Claims (Pet. App. 17–25) is not yet reported.

### JURISDICTION

The judgment of the Court of Claims was entered on July 12, 1957. The petition for a writ of certiorari was filed September 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

### QUESTION PRESENTED

Whether the Court of Claims correctly dismissed as untimely a suit filed in 1953 to recover for an

alleged taking of lands on which petitioner had held tax liens when, to the knowledge of the State and local taxing officials, proceedings to condemn such lands were instituted in 1942, physical possession was taken at that time, title was likewise then acquired and a housing project was constructed thereon.

## STATUTE INVOLVED

28 U. S. C. 2501, Supp. IV, provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

## STATEMENT

The facts, as found by the Court of Claims, may be briefly summarized as follows:

In April 1942 the United States filed proceedings to condemn fee simple title, free and clear of all liens, to thirteen parcels of land in Cuyahoga County, Ohio. A declaration of taking was filed the same day and estimated compensation was deposited in court (Fdg. 1, Pet. App. 25–26). A housing project known as Lake Shore Village was constructed on the land, being completed in 1943 and 1944 (Fdg. 19, Pet. App. 36). There were liens upon the lands at the date of taking for taxes and special assessments for many years earlier.

Neither the State, the County or any official of either was named as a party or formally appeared in the proceeding. The county officials had knowledge of the suit. The Prosecuting Attorney who was respon-

sible for representing the County in federal condemnation actions signed and approved of an order of the federal condemnation court declaring all taxes levied after 1942 to be null and void (Fdg. 10, Pet. App. 31–32). The local officials were fully informed of the progress of the proceedings and, under court orders, the amounts due on all of the parcels except parcels 2, 3 and 5 were paid (Fdg. 6, Pet. App. 28–29). Here concerned are the taxes which were liens on parcels 2 and 3, the taxes as to parcel 5 having been collected after the suit was filed (Fdg. 16, Pet. App. 35–36).[1]

The amount of just compensation was agreed upon with the former owners of parcels 2 and 3 in stipulations which provided that the agreed amount should be subject to "all liens, encumbrances and charges of whatsoever nature" existing at the date of taking and that all awards of just compensation to all parties "now or subsequently named as defendants herein" should be payable from the agreed amount (Fdg. 22, Pet. App. 37–39). This same form was used to express settlements made as to other parcels (Fdg. 22, Pet. App. 38). The funds deposited by the United States were, however, distributed by the Court to the former owners of parcels 2 and 3 without deduction of taxes owing (Fdgs. 24–25, Pet. App. 39–42). The Chief Deputy County Treasurer knew of this payment within a month of the final orders of distribution filed April 8, 1948, and he informed the Assistant Prosecuting Attorney (Fdgs. 10, 15, Pet. App. 31, 35).

[1] Partial payment was made under orders of distribution as to parcels 2 and 3 (Fdg. 6, Pet. App. 28–29).

The present action was filed on April 13, 1953, no County official having ever made demand upon the former owners of parcels 2 and 3 or having even attempted to ascertain whether demand could result in payment to the County (Fdg. 16, Pet. App. 35–36). Such payment was made as to parcel 5 when the United States Attorney made written demand after the suit was filed. (Fdg. 16, Pet. App. 36). Also, the United States moved in the condemnation proceeding asking that the County be formally joined therein as a party and that the former owners be required to redeposit the amounts of the taxes due. The County officials opposed that motion which was denied. The United States caused the joinder of the former owners as third-party defendants to the present proceeding.

Petitioner had argued that it was relying on promises made by the federal attorney handling the case. Consequently, in addition to the facts just outlined, the Court of Claims found (Fdg. 18, Pet. App. 36):

> It is not established that Mr. O'Neil had authority by virtue of his office or was otherwise authorized to make any commitment to, or enter into any arrangement with, any county official binding the United States with respect to payment of taxes to the county. The contemporary documentary evidence does not show that Mr. O'Neil made any commitment to, or entered into any arrangement with, any county official with respect to payment of delinquent taxes.

The Court of Claims held that this suit was barred by the six year limitation upon suits against the United States, also stating that the County's remedy was in the condemnation proceeding, of which it had actual knowledge (Pet. App. 17–19). Chief Judge Jones filed a dissenting opinion in which Judge Littleton joined.

## ARGUMENT

Petitioner's entire argument is founded upon two interrelated assertions which reflect an erroneous view of both the facts of this case and the law which is applicable to those facts. First, the court has found, contrary to petitioner's assertions, that the government attorney was not authorized to and did not promise the taxing authorities that the United States would assume responsibility for correct distribution of the tax share of the deposits. Second, the federal law has long been settled that the obligation of the United States is discharged when it pays compensation representing the value of the property into court, and the United States is not concerned with distribution of those funds, is not responsible for errors the court may make in such distribution and is not even entitled to receive notice of orders of distribution. *United States* v. *Dunnington*, 146 U. S. 338, 352.[2] The United States acquires a title free

[2] See also *United States* v. *Adamant Co.*, 197 F. 2d 1 (C. A. 9); *Phillips* v. *United States*, 151 F. 2d 645 (C. A. 7); *United States* v. *Certain Lands in Borough of Brooklyn*, 129 F. 2d 577 (C. A. 2); *City of St. Paul* v. *Certain Lands in City of St. Paul, Minn.*, 48 F. 2d 805 (C. A. 8); *John Hancock Mut. Life Ins. Co.* v. *Casey*, 147 F. 2d 762 (C. A. 1).

of encumbrances which are transferred to the funds which take the place of the property. *Duckett* v. *United States*, 266 U. S. 149, 151. The courts have very frequently been called upon to apply these principles with relation to claims of taxing authorities, *e. g.*, *United States* v. *150.29 Acres of Land*, 135 F. 2d 878 (C. A. 7); *Washington Water Power Co.* v. *United States*, 135 F. 2d 541 (C. A. 9), certiorari denied, 320 U. S. 747; *Cobo* v. *United States*, 94 F. 2d 351 (C. A. 6); *People of Puerto Rico* v. *United States*, 134 F. 2d 267 (C. A. 1), certiorari denied, 320 U. S. 753. Thus, petitioner is wrong when he asserts (Pet. p. 12) that the United States would be compelled to pay State and County taxes even if the appropriate officials had been formally named as parties. In either case, the obligation of the United States is merely to pay the fund into court.

What petitioner constantly refers to as "the federal mistake"—meaning the distribution of the funds—was not the act of the United States but of the court.[3] And the distribution of the funds by the court could not constitute a taking by the United States. That taking had occurred many years earlier when the United States filed the proceedings, took physical possession, took title under the Declaration of Taking Act and constructed the project. If we assume,

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[3] This Court has said, in *United States* v. *Dunnington*, 146 U. S. 338, 351–352: "The courts of the United States are in no sense agencies of the Federal government, nor is the latter liable for their errors or mistakes; they are independent tribunals, created and supported, it is true, by the United States; but the government stands before them in no other position than that of an ordinary litigant."

*arguendo,* that petitioner was not bound by the condemnation proceedings, then the case presented would be as if the United States had seized possession without instituting proceedings. There would then have been a taking at the time of seizure. On that assumption, the six year time limit for recovery for the taking had long since expired, as the Court of Claims held.

We think it is also clear that the local authorities were, in fact, parties to the condemnation proceedings. They had actual knowledge of them and engaged in extensive correspondence concerning them. More important, the Prosecuting Attorney approved what was, in effect, a consent order containing an injunction against collecting taxes after 1942 on these lands. And the taxing authorities received, pursuant to orders of distribution, some of the taxes due on these parcels as well as all taxes due on other parcels. Petitioner has thus received benefits as if formal joinder as a party had been accomplished. A remedy was readily available for collection of the taxes in the condemnation proceedings.[4] Thus the facts of this case are certainly a far cry from the "citation by rumor or by the uncertain word of village gossip" referred to in the dissenting opinion (Pet. App. 20).

In essence petitioner seeks to transfer to the United States his duty of seeing that the taxes are collected. No statute, contract or rule of law authorizes imposi-

[4] No reason appears why, even after the mistaken distribution, the matter could not have been corrected by the court if called to its attention with reasonable promptness. Cf. Rule 60 (b), F. R. Civ. P.

tion of such a function upon federal attorneys conducting condemnation proceedings.

## CONCLUSION

There is no conflict of decision nor issue warranting review by the Court. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

J. LEE RANKIN,
*Solicitor General.*
PERRY W. MORTON,
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ROGER P. MARQUIS,
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OCTOBER 1957.

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